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IN THE
Supreme Court of the United States

October Term, 1948

No. 689

CHARLES C. CARLSON, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*
LOUISE C. CARLSON, *Intervenor*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR INTERVENOR IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Communications Commission (J. A. 204) are not yet reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (J. A. 276) is not yet reported.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit on February 14, 1949, affirmed the decision of the Federal Communications Commission. The petition for a writ of certiorari was filed on April 1, 1949. Petitioner invokes the jurisdiction of this Court under the provisions of 62 STAT., 28 U. S. C. A. §1254(1) (1948).

QUESTION PRESENTED

— Whether the Federal Communications Commission properly denied petitioner's application for renewal of his station license on the basis of findings of fact and conclusions made on the hearing record that petitioner had demonstrated his lack of qualifications to continue as a radio broadcasting station licensee because of continued and persistent violations of the Commission's Rules and Regulations and Standards of Good Engineering Practice over a period of years.

STATUTE AND RULES AND REGULATIONS INVOLVED

The statute and rules and regulations involved are the Communications Act of 1934, as amended, 48 STAT. 1064 (1934), 47 U. S. C. §151 (1946), and the Rules and Regulations of the Federal Communications Commission. The pertinent sections of the Communications Act and of the Commission's Rules and Regulations are set forth in the appendix to the petition.

STATEMENT

The intervenor adopts the Statement contained in the brief in opposition of the respondent.

ARGUMENT

1. The first question presented to this Court is whether petitioner was denied a full and fair hearing because the Commission refused his request for a continuance of the oral argument. It is important to note in this connection that there is no dispute among the parties as to the proper rule of law applicable to the instant issue. Petitioner only cites authority for general legal principles that are obviously applicable to every case involving a hearing. He cites no authority to dispute the fact that the applicable rule of law, as established by this Court and by the United States Court of Appeals for the District of Columbia Circuit, is that a continuance is a matter within the discretion of the trial court or the administrative agency and a ruling on a request for such will not be reversed upon appeal unless there is a clear showing that this discretion has been abused. *Avery v. Alabama*, 308 U. S. 444, 446 (1940); *California Oregon Power Co. v. Federal Power Commission*, 150 F. (2d) 25, 28 (C. C. A. 9th, 1945), *cert. denied*, 326 U. S. 781 (1946); *Neufeld v. United States*, 73 App. D. C. 174, 179, 118 F. (2d) 375, 380 (1941), *cert. denied*, 315 U. S. 798 (1942).

This question, therefore, involves, in reality, only an issue of fact. An administrative agency and an appellate court have already decided that the facts alleged by petitioner neither entitled him to a continuance nor justified a reversal of the agency's denial of such. There is nothing of legal importance involved in this question — in fact, a decision on this issue would be of no value as a precedent since the individual facts are peculiar to this case.

One other aspect of the question should be called to the Court's attention. Intervenor, in her opposition to the telegraphic request for a continuance filed by Mr. Maurice B. Gatlin, petitioner's New Orleans counsel, definitely put in issue the good faith of said counsel in making the re-

quest. (J. A. 179). It is submitted that, once such an issue is raised, the administrative agency is clearly justified in denying a request for a continuance. *See Harrah v. Morgenthau*, 67 App. D. C. 119, 120, 89 F. (2d) 863, 864 (1937).

Since this question then involves only a pure issue of fact, the following additional information, omitted by petitioner, should be supplied for the Court's consideration: (1) Petitioner's requests for a continuance of the oral argument can hardly be considered to have been reasonable. The petition to reopen the record and continue the oral argument filed on February 10, 1948, in effect requested an indefinite continuance (J. A. 171), and the telegraphic request filed by Mr. Gatlin on February 12, 1948 asked for a month's continuance (J. A. 175). (2) Petitioner alleges that he was deprived of the right to be represented by counsel of his own choice since Mr. Gatlin was not present at the oral argument and his request for a continuance was denied. At the second hearing, held on November 4, 5, and 6, 1946, petitioner was represented by the Washington law firm of Fisher, Wayland, Duvall and Southmayd, and this firm *alone* entered an appearance for petitioner (T. 604). The entire hearing was conducted on behalf of petitioner by Mr. Fisher (J. A. 103 *et seq.*), and Mr. Gatlin appeared only as a witness (J. A. 140). At the time of the telegraphic request for a continuance, petitioner was still represented by his Washington attorneys (J. A. 184). (3) Petitioner never requested the Federal Communications Commission to continue the oral argument on the ground of inadequate notice of the date scheduled therefor.

It is submitted, therefore, that petitioner's first question not only does not present an issue of legal importance but, furthermore, the facts developed in the petition for a writ of certiorari and the oppositions thereto clearly show that the denials of the requested continuances were fully justified.

2. The second question presented for consideration is whether the Commission erred in granting intervenor a comparative hearing with petitioner. The mutually exclusive application of intervenor was filed with the Commission on September 20, 1946, and was accompanied by a petition requesting a consolidated hearing on her application and petitioner's application for renewal of license (J. A. 97). Petitioner did not oppose this petition, and the applications were consolidated for hearing on September 25, 1946. (J. A. 101). Petitioner not only did not oppose the grant of the petition but, in fact, used it as the basis for a petition requesting a continuance of the hearing, which was, as a consequence, postponed from October 10, 1946, to November 4, 1946 (T. 605).

The Commission's Rules in existence at the time of the consolidation provided that the Commission, in the exercise of its discretion, could designate a mutually exclusive application for hearing in a comparative proceeding with an application already designated for hearing even though the former wasn't filed until after the designation of the latter (Pet. App. 24-25). The present rule covering this point and providing that such a mutually exclusive application may only be designated for hearing in the same proceeding if it is filed more than twenty days before the commencement of the hearing did not become effective until December 2, 1946, after the hearing in the instant case was completed. Therefore, petitioner is urging that this Court attach considerable legal importance to an issue involving a rule that no longer is effective and consequently is asking this Court to render a decision that would be of no value as a legal precedent. It is submitted that when petitioner's brief (1) shows that an appellate court has already found a contention to be without merit and (2) fails to even allege that the issue is of any present legal importance, then this question is not a matter which should receive the consideration of this Court.

3. Petitioner's third question raises the issue of whether the Commission was arbitrary in refusing to consider his application for a construction permit to change transmitter location and install new equipment together with the record of the consolidated hearing. The application for a construction permit was not filed until May 28, 1947, more than six months after the hearing record had been closed. It was not until September 24, 1947, more than ten months after the record was closed, that petitioner requested joint consideration of his application for a construction permit and his application for renewal of license (J. A. 167). Irrespective of how such a consolidation would have violated the procedural rights of intervenor, it is clear that the petition for consolidation was addressed solely to the discretion of the Commission. Petitioner cites neither statute, regulation, nor case authority to show that he was entitled to such a comparative consideration as a matter of right. Therefore, petitioner is again asking this Court to grant certiorari to review the Commission's exercise of its discretion, without questioning the validity of the applicable rule of law.

4. The fourth question raised by petitioner is based on the Commission's denial on April 22, 1948, of his second petition to reopen the record, filed on March 18, 1948 (J. A. 189). Petitioner contended that intervenor had attempted to seize control of Station WJBW in contravention of Section 310(b) of the Communications Act of 1934 and that the Commission should have reopened the record in this proceeding to receive evidence on this point since it was related to the qualifications of intervenor to be a licensee.

Appellant's brief in the appellate court raised, for the first time, the argument that had the Commission considered the evidence concerning the alleged violation by intervenor of Section 310(b) ". . . it might well have reached a different conclusion than it did in denying appellant's ap-

plication . . .” The second petition to reopen the record did not, in any way, allege that this evidence was relevant or material to appellant’s case but concerned itself solely with the Commission’s duty to take action against intervenor for her alleged violation of the Communications Act of 1934. Nor was this contention raised in the application for rehearing filed by appellant on May 14, 1948 (J. A. 248). The accepted rule of law is that an appellate court will not consider or review contentions not presented before the lower court. *Adams v. Mills*, 286 U. S. 397, 416-417 (1932); *United Rys. & Electric Co. of Baltimore v. West*, 280 U. S. 234, 248 (1930). It is submitted, therefore, that petitioner may not now contend in this Court that the admission of this evidence would have affected the decision in his case and, therefore, its exclusion by the Commission was erroneous.

In addition, it is submitted that petitioner had no appealable interest based on the Commission’s refusal to receive this evidence, and the question presented to this Court is therefore moot. Both the Commission’s proposed and final decisions denied petitioner’s application for renewal of license solely on the ground that the record conclusively demonstrated his unfitness to be a licensee of a radio station. The granting of a construction permit to intervenor was not made on the basis of any comparative qualifications. Petitioner would have been deprived of his license whether intervenor had applied for his facilities or not, and, therefore, the grant to intervenor was in no way prejudicial to him. After the decision, intervenor’s status as the permittee of a radio station was separate and distinct from petitioner’s. When petitioner complained that intervenor was not qualified to be a licensee, he was in the same status as any other citizen making a complaint, and he had no right to insist that the Commission take any action on that complaint. Therefore, he was not injured by the Commission’s refusal to reopen the record to receive this evidence, and he cannot now urge this con-

tention before this Court since he is not aggrieved or adversely affected by the Commission's action in this respect.

Petitioner contends in his argument that the Court of Appeals' decision in the instant case appears to be in conflict with its decision in *WJR, The Goodwill Station, Inc. v. Federal Communications Commission*, No. 9464, decided on October 7, 1948. It is submitted that the decision in that case does not conflict with the Court of Appeals' decision in the instant proceeding because of a completely different factual situation. In the *WJR* case, appellant was an existing licensee protesting the Commission's grant, without hearing, of a construction permit for a station to operate on the same frequency as was assigned to it. Section 312(b) of the Communications Act of 1934 provides that an existing station's license may be modified only after a hearing. Appellant filed a timely petition for reconsideration of the Commission's action, as provided by Section 405 of the Communications Act of 1934, setting forth therein facts which it alleged showed that it was entitled to a hearing. This petition was denied by the Commission without granting appellant an opportunity for oral argument thereon. The appellate court held that appellant could not be deprived of its statutory right to a hearing, and, since it had proceeded in conformance with the statutory remedy provided in Section 405, it was entitled to an oral argument on the petition for reconsideration. The significant factor in that case was that appellant possessed a statutory right to a hearing, and, unless a hearing were afforded at the time it was requested, appellant would be forever deprived of this right.

In the instant case, however, petitioner had no statutory right to an oral argument on his petition to reopen the record. Moreover, petitioner did not even proceed in accordance with the statutory remedy provided in Section 405. Therefore, his petition was directed to the general power of the Commission to grant or deny oral argument

as a matter of discretion. Unlike the *WJR* case, therefore, since no statutory right of petitioner is invoked, it follows that no hearing is required by due process. This Court has clearly held that no such right accrues to a party filing a petition for rehearing:

"One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence — particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it — always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right but were pleas to discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body." *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 514-515 (1944).

Petitioner had a statutory right to a hearing before his application for renewal of license could be denied. The material fact in the instant case which distinguishes it from the *WJR* case is that petitioner received the hearing required by statute. The case, therefore, is completely opposite. In the instant case, petitioner, after his statutory right to a hearing had been fully complied with, asked for an additional hearing on a matter addressed solely to

the discretion of the Commission. Whether or not a party has been deprived of a fair hearing in any particular case is to be determined by looking at the proceedings as a whole. Due process does not require that any particular procedure be followed, and it is essential only that a party receive a full and fair hearing at some stage of the proceedings before the decision becomes final:

“We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary. *Morgan v. United States*, 298 U. S. 468, 481, 56 S. Ct. 906, 912, 80 L. Ed. 1288. ‘The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.’” *Inland Empire District Council, Lumber and Sawmill Workers Union v. Millis*, 325 U. S. 697, 710 (1945), rehearing denied, 326 U. S. 803 (1945).

It is submitted, therefore, that petitioner’s allegation that the instant case is in conflict with the lower court’s previous decision in the *WJR* case is without merit. In addition, it is clear that the facts of this case do not raise a question of legal importance as to “the area in which the Commission is required to ‘hear’ petitions of interested parties presenting questions of law or fact and the area in which petitions may be denied without a hearing,” as is suggested in the instant petition. As heretofore shown, the “area” involved in the instant case is one in which a complete hearing has been afforded and the record closed. Since this Court has already clearly held that a petition in this “area” is addressed solely to the discretion of the administrative agency, and thus no hearing is required, it is submitted that this question has been specifically answered, with the decision in the instant case being in complete harmony therewith.

5. Petitioner's final question raises the point that the Commission erred in failing to consider all of the evidence and in failing to find that petitioner was qualified to receive a renewal of his license. Again petitioner is not raising a question of general legal importance but only the issue as to whether there was substantial evidence in the record to support the findings of the Commission. The appellate court found that there was ample evidence, and petitioner, by conceding in his petition that most of the alleged violations took place, stipulates himself out of court.

In the opening paragraph of his argument, petitioner contends that it would be appropriate for the Court to grant certiorari in this case "in order to lay down well-defined principles for the guidance of the Commission in future cases" involving applications for renewal of license. It is clear, however, that there is only one principle involved that is peculiar to these cases, i.e., that repeated and willful violations of the Commission's Rules and Regulations fully justify a denial of an application for renewal of license. Without such a power to protect its Rules and Regulations, the Commission would be rendered helpless as an administrative agency. The United States Court of Appeals for the District of Columbia Circuit has specifically upheld the Commission's authority in this regard. *Greater Kampeska Radio Corporation v. Federal Communications Commission*, 71 App. D. C. 117, 108 F. (2d) 5 (1939). Therefore, a review of the instant case would not result in any definition of law in connection with applications for renewal of license that is not already well established.

It is submitted, therefore, that a review of this case would not establish any principles of legal importance or guidance in future cases since petitioner has in effect only alleged that, while the applicable law is clear, the facts of his case require a different decision. Such an allegation can be made by every litigant in every case. Intervenor has

charged that petitioner was not proceeding in good faith (J. A. 179), and the United States Court of Appeals for the District of Columbia Circuit, by hearing the case on Friday, February 11, 1949, issuing a *per curiam* decision on Monday, February 14, 1949, and awarding costs to intervenor, in effect, has held that the appeal was frivolous (J. A. 277). Such a decision creates a *prima facie* case that petitioner's appeal does not raise any question of legal importance, and it is submitted that the petition for a writ of certiorari completely fails to rebut that presumption.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Counsel for Intervenor

April 1949